BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	
Unbundled Access to Network Elements	WC Docket No. 04-313
Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers	CC Docket No. 01-338

OPPOSITION OF VERIZON[1] TO EMERGENCY PETITION FOR EXPEDITED DETERMINATION

The so-called Emergency Petition for Expedited Determination filed by XO Communications, Inc. ("XO") on September 29, 2004 must be denied. In a nutshell, XO seeks an immediate order finding that CLECs are impaired nationwide without UNE access to DS1 loops and requiring ILECs to provide such loops as UNEs. XO claims that the Commission can issue such an order by: (1) relying on the record compiled in the *Triennial Review Order*; (2) declaring that the D.C. Circuit, in *United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) ("*USTA II*"), did not vacate the Commission's rule requiring unbundling of DS1 loops; or (3) making a new finding of impairment nationwide. *See* XO Mot. at 39. As demonstrated by the comments and supporting evidentiary record Verizon filed in these dockets on October 4, 2004, XO is wrong on all counts. Indeed, XO (like the other CLEC commenters) has submitted none of the evidence in their possession that would enable the Commission to evaluate their assertions of impairment. Nor, as explained below, can the Commission rule first on CLECs'

[1] The Verizon telephone companies ("Verizon") are the local exchange carriers affiliated with Verizon Communications Inc., and are listed in Attachment A.

claims of impairment with respect to high-capacity facilities, while delaying its ruling on mass-market switching.

First, the Commission cannot rely on a record compiled two years ago to make a finding that CLECs are impaired without UNE access to DS1 loops *today*. This is particularly true here, where the Commission has sought (and received) new evidence on the lack of impairment. Indeed, it would be arbitrary and capricious for the Commission to impose any unbundling requirement as to DS1 loops before it has a chance to digest the voluminous record evidence that was filed on October 4 and that will be filed on October 19. *See, e.g., Brae Corp. v. United States*, 740 F.2d 1023, 1062 n.20 (D.C. Cir. 1984) (agency promulgating rules must "identif[y] all relevant issues, [and] g[i]ve them thoughtful consideration duly attentive to comments received").[2]

Second, the D.C. Circuit vacated the Commission's DS1 UNE loop rule for the same reasons that it vacated all of the Commission's UNE transport and high-capacity loop rules: among other things, the Commission unlawfully delegated authority to state commissions, ignored CLECs' use of special access to compete, and improperly treated each route as a unique market. *See* Verizon Comments at 34-35.

Third, the record that the Commission is compiling today precludes a nationwide finding of impairment. That record demonstrates that competing providers are using their own facilities, other competitive facilities, and special access, either alone or in combination, to serve customers of all shapes and sizes, and in all geographic markets, that seek to purchase high-capacity service

[2] XO also has shown no need for an expedited ruling on DS1 loops. As a result of the Commission's August 20, 2004, *Interim Order*, XO and other CLECs are obtaining DS1 loops from incumbents today on the same terms and conditions as they received them on June 15, 2004, and will be able to continue doing so until the Commission issues final unbundling rules. Although Verizon and other incumbents have challenged the *Interim Order*, that order remains in effect today.

below the DS3 level. In contrast, neither XO nor any other CLEC — despite their numerous, conclusory assertions of impairment — has provided detailed evidence as to how it is serving customers. This evidence, to which they have unique access, includes where XO and other CLECs have deployed their own facilities, where they have lit buildings (whether directly, "on net," or indirectly), and where they serve customers using facilities leased from other providers, including the ILECs' special access facilities. These competitors' intent is plain — they want the Commission to find impairment and order unbundling *before* they are forced to reveal the evidence that would thoroughly undermine their claims of impairment. This puts the Commission in the untenable position of having to evaluate their claims of impairment without the evidence most relevant to that inquiry. And unless the Commission compels competitors to provide this information — as Verizon and others have requested that the Commission do[3] — any UNE rules it adopts will be tainted with reversible error, because "it would hardly seem a difficult matter for the [Commission] to have compiled [this] data." *Timpinaro v. SEC*, 2 F.3d 453, 459 (D.C. Cir. 1993).

Finally, there is no merit to XO's suggestion that the Commission can issue final rules that are limited to high-capacity facilities (or a particular type of high capacity facilities) and delay issuing final rules on the other elements at issue here to some indefinite future date. Indeed, the Commission has represented to the D.C. Circuit that it will issue new rules as to *all* of the elements for which the court vacated the Commission's UNE rules by December 15, 2004. *See* Opposition of Respondents to Petition for a Writ of Mandamus, *USTA v. FCC*, Nos. 00-1012 *et al.*, at 11 (D.C. Cir. filed Sept. 16, 2004) ("[T]he Commission has commenced its proceeding on remand and intends to act quickly to adopt final rules that respond to this Court's mandate in

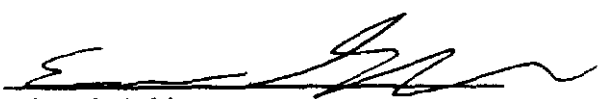
[3] *See* Emergency Request for Access to CLEC Data Relevant to the Impairment Inquiry, WC Docket Nos. 04-313, *et al.* at 8-9 (filed Sept. 17, 2004).

USTA II. Chairman Powell has scheduled the matter for a vote at the Commission's December 2004 open meeting"); *see also id.* at 1, 7, 21, 25. Based on the Commission's representation, the D.C. Circuit deferred ruling on Verizon's and other incumbents' petition for a writ of mandamus and will consider the issues raised in early January 2005. *See* Order, *USTA v. FCC*, No. 00-1012 *et al.* (D.C. Cir. Oct. 6, 2004). The court thus gave the Commission to the end of the year to issue final unbundling rules responsive to the D.C. Circuit's vacatur of its high-capacity facility and mass-market switching UNE rules. The Commission, therefore, cannot consistent with its commitments to the Court issue rules only as to some of those elements, delaying ruling on the others beyond the end of the year.

CONCLUSION

For the foregoing reasons, the Commission should deny XO's motion.

Respectfully submitted,



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October 12, 2004

CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of October, 2004, a copy of the foregoing document was served upon the following individuals via facsimile and UPS overnight:

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ATTACHMENT A

THE VERIZON TELEPHONE COMPANIES

The Verizon telephone companies are the local exchange carriers affiliated with Verizon Communications Inc. These are:

Contel of the South, Inc. d/b/a Verizon Mid-States
GTE Southwest Incorporated d/b/a Verizon Southwest
The Micronesian Telecommunications Corporation
Verizon California Inc.
Verizon Delaware Inc.
Verizon Florida Inc.
Verizon Hawaii Inc.
Verizon Maryland Inc.
Verizon New England Inc.
Verizon New Jersey Inc.
Verizon New York Inc.
Verizon North Inc.
Verizon Northwest Inc.
Verizon Pennsylvania Inc.
Verizon South Inc.
Verizon Virginia Inc.
Verizon Washington, DC Inc.
Verizon West Coast Inc.
Verizon West Virginia Inc.